

April 9, 2013

The Manitoba Métis Case and the Honour of the Crown

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Case commented on:

Manitoba Métis Federation Inc v Canada (Attorney General), [2013 SCC 14](#)

In its historic decision on the constitutional rights of the Manitoba Métis, the majority of the Supreme Court of Canada, in a decision rendered by the Chief Justice and Justice Karakatsanis (Rothstein and Moldaver JJ dissenting), concluded that section 31 of the *Manitoba Act*, 1870 (reprinted in RSC 1985, App. II, No. 11) expresses a constitutional obligation to the Métis people of Manitoba to provide Métis children with allotments of land. The majority held that the obligation did not impose a fiduciary or trust duty on the Crown but that it did engage “the honour of the Crown.” The majority held that the Crown failed to live up to the terms of that engagement and that the Métis were accordingly entitled to a declaration to that effect. The claim for declaratory relief in relation to the honour of the Crown was not barred by the law of limitations or the equitable doctrine of laches.

Section 31 of the *Manitoba Act* provides that:

31. And whereas, it is expedient, towards the extinguishment of the Indian Title to the lands in the Province, to appropriate a portion of such ungranted lands, to the extent of one million four hundred thousand acres thereof, for the benefit of the families of the half-breed residents, it is hereby enacted, that, under regulations to be from time to time made by the Governor General in Council, the Lieutenant-Governor shall select such lots or tracts in such parts of the Province as he may deem expedient, to the extent aforesaid, and divide the same among the children of the half-breed heads of families residing in the Province at the time of the said transfer to Canada, and the same shall be granted to the said children respectively, in such mode and on such conditions as to settlement and otherwise, as the Governor General in Council may from time to time determine.

According to the Supreme Court (at para 93) (endorsing the judgment at trial) section 31 “was a constitutional provision crafted for the purpose of resolving Aboriginal concerns and permitting the creation of the province of Manitoba.” But within the broader framework of the relationship between the Crown and the Aboriginal peoples of Canada generally and the broader jurisprudence of the Court, the section assumed additional responsibilities (at para 98):

... s. 31 of the *Manitoba Act* was to reconcile the Métis community with the sovereignty of the Crown and to permit the creation of the province of Manitoba. This reconciliation was to be accomplished by a more concrete measure — the prompt and equitable transfer of the allotted public lands to the Métis children.

The theme of reconciling the Aboriginal peoples to the Crown's acquisition of sovereignty is fully consistent with earlier decisions of the Supreme Court starting with *R v Van Der Peet*, [1996] 2 SCR 507 (at para 31).

The *Manitoba Act* is part of the Constitution of Canada. It is listed in Schedule I to the *Constitution Act, 1982* (item # 2). Given that, it was presumably open to the Court to consider and grant a declaration that Canada was in breach of its obligations under section 31 of the Act. Indeed that seems to have been part of what the plaintiffs asked for (at para 100):

The Métis allege Canada failed to fulfill its duties to the Métis people in relation to the children's grant in four ways: (1) inexcusably delaying distribution of the s.31 lands; (2) distributing lands via random selection rather than ensuring family members received contiguous parcels; (3) failing to ensure s.31 grant recipients were not taken advantage of by land speculators; and (4) giving some eligible Métis children \$240 worth of scrip redeemable at the Land Titles Office instead of a direct grant of land

True enough, the plaintiffs also wanted to go beyond that and seek a declaration that Canada was in breach of its fiduciary obligations. The advantage of such a plea if successful (it was not) is both rhetorical and practical. The rhetorical aspect is obvious, the more practical angle is that such a declaration moves the case from the realm of public law to the realm of private law and the language of damages and constructive trust: *Blueberry River Indian Band v Canada*, [1995] 4 SCR 344.

But in this case the majority of the Court went out of its way to frame the issue not simply in terms of a declaration that the Crown had failed to live up to the obligations of section 31, but rather that it had failed to live up to the obligations associated with the honour of the Crown. In doing so the Court must have given the plaintiffs much of what they were looking for in terms of rhetorical and political support even while rejecting the fiduciary duty argument.

What then is the difference between a declaration that the Crown is in breach of a legal or even a constitutional duty and a declaration that the Crown is in breach of its honour (even framing it that way sounds odd)?

The Court summarizes the state of the law in relation to the honour of the Crown as follows (at para 73):

- (1) The honour of the Crown gives rise to a fiduciary duty when the Crown assumes discretionary control over a specific Aboriginal interest (*Wewaykum*, at paras. 79 and 81; *Haida Nation*, at para. 18);
- (2) The honour of the Crown informs the purposive interpretation of s. 35 of the *Constitution Act, 1982*, and gives rise to a duty to consult when the Crown contemplates an action that will affect a claimed but as of yet unproven Aboriginal interest: *Haida Nation*, at para. 25;
- (3) The honour of the Crown governs treaty-making and implementation: *Province of Ontario v. Dominion of Canada*, (1895), 25 S.C.R. 434, at p. 512, per Gwynne J., dissenting; *Mikisew Cree First Nation v. Canada (Minister of*

Canadian Heritage), 2005 SCC 69, [2005] 3 S.C.R. 388, at para. 51, leading to requirements such as honourable negotiation and the avoidance of the appearance of sharp dealing (*Badger*, at para. 41); and

(4) The honour of the Crown requires the Crown to act in a way that accomplishes the intended purposes of treaty and statutory grants to Aboriginal peoples: *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 43, referring to *The Case of The Churchwardens of St. Saviour in Southwark* (1613), 10 Co. Rep. 66b, 77 E.R. 1025, and *Roger Earl of Rutland's Case* (1608), 8 Co. Rep. 55a, 77 E.R. 555; *Mikisew Cree First Nation*, at para. 51; *Badger*, at para. 47.

But what did that mean in the present context?

The majority discusses this starting at paragraph 75 when they note that “when the issue is the implementation of a constitutional obligation to an Aboriginal people, the honour of the Crown requires that the Crown: (1) takes a broad purposive approach to the interpretation of the promise; and (2) acts diligently to fulfill it.”

The first requirement ensures that the interpretation of the relevant provision “cannot be a legalistic one that divorces the words from their purpose.” As for the second, in order to fulfill this duty (at para 80), “Crown servants must seek to perform the obligation in a way that pursues the purpose behind the promise.” The honour of the Crown does not demand perfection (at para 82):

Not every mistake or negligent act in implementing a constitutional obligation to an Aboriginal people brings dishonour to the Crown. Implementation, in the way of human affairs, may be imperfect. However, a persistent pattern of errors and indifference that substantially frustrates the purposes of a solemn promise may amount to a betrayal of the Crown’s duty to act honourably in fulfilling its promise. Nor does the honour of the Crown constitute a guarantee that the purposes of the promise will be achieved, as circumstances and events may prevent fulfillment, despite the Crown’s diligent efforts.

The Court measured Canada’s performance against four alleged failings: (1) inexcusable delay in the distribution of the s.31 lands; (2) distributing lands via random selection rather than ensuring family members received contiguous parcels; (3) failing to ensure that section 31 grant recipients were not taken advantage of by land speculators; and, (4) giving some eligible Métis children \$240 worth of scrip redeemable at the Land Titles Office instead of a direct grant of land.

The Court found that Canada was in breach of its “honour of the Crown duty” by its delay because of a persistent pattern of inattention (at para 108) which meant that it failed to achieve the purpose of section 31 (at para 110) which was to give “the Metis children a real advantage relative to an impending influx of settlers from the east” or (at para 99) a “head start in the race for land and a place in the new province. This required that the grants be made while a head start was still possible.”

By contrast, the process of random selection that the Crown used to distribute land did not violate the honour of the Crown. There was no commitment to locate children’s land close to that of their parents and any effort to do so would likely have created unfairness and divisiveness (at para 130).

The issue of sales to speculators was more difficult because it caused the court to weigh the virtues of alienability vs inalienability of indigenous lands. This continues to be a challenging debate with important contributions coming from De Soto, *The Mystery of Capital* (2000) in an international context and from Tom Flanagan and colleagues in a Canadian context: *Beyond the Indian Act: Restoring Aboriginal Property Rights* (2010). Here the Court ruled (at para 117) that the honour of the Crown did not demand that the grant lands be made inalienable, but the difficulty here was that the delays in the granting process led many grantees to sell their entitlement before their land selection was known with the result that the price was discounted significantly. The result was inconsistent with the honour of the Crown since (at para 117) it perpetuated “a situation where children were receiving artificially diminished value for their land grants.”

The Crown’s decision to use scrip to make up for the fact that the 1.4 million acre allotment referred to in section 31 proved inadequate (insofar as there were more eligible children than expected) was reasonable and was neither a breach of section 31 nor a breach of the honour of the Crown (at para 120):

As long as the 1.4 million acres was set aside and distributed with reasonable equity, the scheme of the *Manitoba Act* was not offended. It was unavoidable that the land would be distributed based on an estimate of the number of eligible Métis that would be inaccurate to some degree. The issuance of scrip was a reasonable mechanism to provide the benefit to which the excluded children were entitled.

But the delay in distributing scrip was again problematic since by the time that scrip was made available it was inadequate to purchase the 240 acres that had been made available to other children:

The delay resulted in the excluded children receiving less land than the others. This was a departure from the s.31 promise that the land would be divided in a roughly equal fashion amongst the eligible children (at para 121).

[T]he delayed issuance of scrip redeemable for significantly less land than was provided to the other recipients further demonstrates the persistent pattern of inattention inconsistent with the honour of the Crown that typified the s.31 grants (at para 123).

The conclusion of the majority on the Honour of the Crown argument is as follows (at para 128):

The s.31 obligation made to the Métis is part of our Constitution and engages the honour of the Crown. The honour of the Crown required the Crown to interpret s.31 in a purposive manner and to diligently pursue fulfillment of the purposes of the obligation. This was not done. The Métis were promised implementation of the s.31 land grants in “the most effectual and equitable manner”. Instead, the implementation was ineffectual and inequitable. This was not a matter of occasional negligence, but of repeated mistakes and inaction that persisted for more than a decade. A government sincerely intent on fulfilling the duty that its honour demanded could and should have done better.

Commentary

I return by way of short commentary on this decision to a question I posed earlier in this post: what are the implications of concluding that a constitutional instrument is not just a constitutional instrument but that one that engages the honour of the Crown? Or to put it another way, what is the difference between a declaration that the Crown's behaviour is unconstitutional and a declaration that the Crown's behaviour is inconsistent with the honour of the Crown?

I am not sure I know the answer but here are some of the possibilities.

First, it may be that the Court applies a different and more demanding interpretive approach to an honour of the Crown provision in the Constitution than to a constitutional provision that does not engage the honour of the Crown. This would be a strange result since the Court routinely takes a purposive approach to the interpretation of constitutional provisions: see *Van Der Peet* above. Talk of a more or less purposive interpretive approaches seems to no more helpful than talk of "unreasonable" and "patently unreasonable" decisions of administrative decision-makers.

Second, it may be that there is more opprobrium attached to a declaration that the Crown is in breach of its honour than a declaration that the Crown's behaviour is unconstitutional. I confess that this is hardly intuitive for me and that is because of the fuzziness associated with the term "honour" even if "of the Crown." At least I think I know what the Constitution is and I know that a breach of the Constitution is fundamentally inconsistent with the rule of law. Is dishonourable behaviour worse than this? I confess that I don't know.

Third, it may be that a declaration of dishonourable behaviour makes a moral claim to redress that is not so obviously demanded by a declaration that the historical behaviour of the Crown was unconstitutional. I say a "moral" claim to redress because a declaration simply establishes the legal relationship between the parties to the litigation; it is not itself a remedy. If it were a legal remedy there would have been a limitations problem in this case. But why might the moral claim to redress be stronger? I think that the claim to redress might be stronger because of the association in the jurisprudence between the honour of the Crown and reconciliation. Here are some examples:

[31] ... what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.
(emphasis added) *R v Van der Peet* (per Lamer CJC)

[16] "The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples ... It is not a mere incantation, but rather a core precept that finds its application in concrete practices." *Haida Nation v British Columbia (Ministry of Forests)*, [2004] 3 SCR 511.

[20] The honour of the Crown is in turn grounded in the objective of achieving reconciliation: the reconciliation of “pre-existing Aboriginal sovereignty with assumed Crown sovereignty” *Haida Nation*.

[32] The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*. This process of reconciliation flows from the Crown’s duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown’s assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people. As stated in *Mitchell v. M.N.R.*, ... at para. 9, “[w]ith this assertion [sovereignty] arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation” (emphasis added) *Haida Nation*.

[54] Treaty making is an important stage in the long process of reconciliation, but it is only a stage. What occurred at Fort Chipewyan in 1899 was not the complete discharge of the duty arising from the honour of the Crown, but a rededication of it. *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69.

Thus, when the Court declares that the Crown has failed to live up to the honourable expectations demanded of it then one of the possibilities is that this has interfered with the goal of achieving reconciliation; and whatever the legal effect of a declaration the Crown must have a continuing obligation to take the steps necessary to achieve reconciliation. And it would not be too much of an extension of the existing case law to suggest that this must mean a duty to engage in good faith consultations with a view to achieving the reconciliation that has been thwarted by the Crown’s dishonourable dealings.

Where will this case have an impact?

It will be interesting to see if this decision will have a broad impact or whether it will be confined in the case law that follows to its particular historical facts. There are perhaps three areas where we can expect the decision to have an impact. First, there are other big historical cases out there for which the decision may be directly applicable. The provisions that come to mind include Article 13 of British Columbia’s Terms of Union, 1871 (as to which see *Jack v R*, [1980] 1 SCR 294) and the “well-being of the tribes” provision in the Schedules to the Rupert’s Land and Northwest Territory Order, 1870 (as to which see *Montana Band v Canada*, 2006 FC 261). Second, the decision will likely have an impact on ongoing and any future litigation involving the timely implementation of modern land claim agreements (see *NTI v Canada (Attorney General)*, 2012 NuCJ 11 and my ABlawg post “Disgorgement Damages” on this decision [here](#)). And finally, the decision may well help put teeth into the argument that the Crown owes a justiciable duty to engage in good faith negotiations to achieve the objective of reconciling the prior normative order of indigenous peoples with the Crown’s unilateral assertion of sovereignty.



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